

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NATIONAL LABOR RELATIONS BOARD,

Applicant

v.

Case No. 16-CV-622-GKF-PJC

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627

Respondent

SUPPLEMENTAL BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

In accordance with the Court’s Order of October 26, 2016, the National Labor Relations Board (the “Board” or “NLRB”), hereby submits this supplemental brief in further support of its Application for an Order Requiring Compliance with Investigative Subpoena (“Application”), which requests that this Court enforce in full the Board’s Subpoena *Duces Tecum* served upon International Union of Operating Engineers, Local 627 (the “Respondent”).

ARGUMENT

I. THE SUBPOENA DUCES TECUM WAS ISSUED IN CONNECTION WITH AN ONGOING INVESTIGATION INTO RESPONDENT’S COMPLIANCE WITH A COURT-ENFORCED BOARD ORDER

In general, the Board’s unfair labor practice proceedings are bifurcated into two stages. *Amglo Kemlite Labs., Inc. v. NLRB*, 833 F.3d 824, 829 (7th Cir. 2016) (“[T]he Board employs a ‘judicially approved bifurcation procedure’ . . .”). First, a liability stage determines whether the National Labor Relations Act (“the Act”) has been violated and what remedies are necessary to restore the status quo ante. Second, a compliance stage resolves any controversies surrounding these remedies, including disputes over the precise amount of backpay owed to workers affected by unfair labor practices. The results of each stage are independently reviewable by a United States court of appeals upon the issuance of a final Board order. *See* 29 U.S.C. § 160(f). Where a

party fails to comply with a court's enforcement of a first-stage Board order fixing liability and setting clear remedies, the Board must then decide whether it is necessary to initiate civil contempt proceedings to compel compliance or to initiate a second-stage compliance proceeding. Section 11 of the Act, 29 U.S.C. § 161, provides the Board with the investigatory tools—including the power to issue subpoenas—to make that determination.

The Board issued the Section 11 subpoena in this case in connection with its investigation into Respondent's compliance with a Board Decision and Order, as enforced by a Judgment of the Tenth Circuit Court of Appeals. *See* 29 U.S.C. § 161. That Decision and Order found that Respondent had committed various unfair labor practices in violation of the Act and ordered Respondent to take several remedial steps. Thus, the Board has already determined that Respondent violated the Act, secured enforcement of its decision with the Tenth Circuit, and is now investigating Respondent's level of compliance with the Tenth Circuit's Judgment.

As catalogued in the Application for Order Enforcing Subpoena Duces Tecum (Dkt. 1), the Memorandum in Support of Application (Dkt. 2), and the Reply to Respondent's Response (Dkt. 9), the NLRB regional office assigned to Respondent's unfair labor practice case has been unable to verify that Respondent has complied with the terms of the court-enforced Board order setting remedies for Respondent's unfair labor practice violations. In fact, the assigned regional office has obtained evidence specifically contradicting Respondent's assertions of voluntary compliance. Therefore, on February 22, 2016, the Region submitted a Recommendation for Instituting Contempt Proceedings against Respondent to the Contempt, Compliance and Special Litigation Branch ("CCSLB") of the Board, pursuant to NLRB Casehandling Manual, Part 3,

Compliance Proceedings § 10632.6.¹ The Manual states that a regional office should submit a case to CCSLB for contempt proceedings when parties have failed and refused to comply with the requirements of a court's judgment:

In cases where respondent refuses to comply with the clear requirements of the judgment . . . or raises only frivolous defenses to compliance, contempt proceedings are generally warranted.

Id. § 10616.

To show that a party is in contempt of a judgment, CCSLB must prove its allegations by clear and convincing evidence. *See, e.g., NLRB v. John Zink Co.*, 551 F.2d 799, 801 (10th Cir. 1967); *W.B. Johnston Grain Co. v. NLRB*, 411 F.2d 1215, 1217 (10th Cir. 1969). An alleged contemnor can defend by showing substantial compliance with the court order in question. *See, e.g., Wash. Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617, 621 (D.C. Cir. 1976). Accordingly, CCSLB routinely uses the Board's Section 11 authority to issue investigative subpoenas in order to gather evidence of noncompliance with a court-enforced Board Order for use in potential contempt proceedings.

Here, CCSLB issued its subpoena in connection with its contempt investigation. The subpoena seeks to resolve the Region's lingering questions regarding Respondent's compliance with the Tenth's Circuit's Judgment: whether the backpay check tendered to the Region fully satisfies Respondent's obligations to Loerwald, whether Respondent has posted the appropriate notices to its members, and whether Respondent has fulfilled the affirmative provisions of the Judgment, such as providing Loerwald with an expunction letter and allowing her to view the out-of-work referral list. This evidence is also vital to any potential contempt proceedings the

¹ The Manual is available on the Board's website at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM3.pdf>

Board may choose to bring against Respondent. Thus, the subpoena here was issued in connection with an ongoing investigation of compliance with a court-enforced Board order.

II. EFFORTS TO ENFORCE THE JUDGMENT OF THE TENTH CIRCUIT ARE “PROCEEDINGS OR INVESTIGATION[S]” WITHIN THE MEANING OF SECTION 11 OF THE ACT

Section 11 of the Act states that the Board “shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring . . . the production of any evidence in such proceedings or investigation requested in such application.” 29 U.S.C. § 161(1). The subpoenas are subject to limited judicial review. *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941). Indeed, an administrative agency has the “power of inquisition,” which is “more analogous to the Grand Jury,” where it can investigate “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *U.S. v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

“The subpoena power of the Board also extends to investigations before or after unfair labor proceedings and includes investigations seeking enforcement of judgments or settlements against violators.” *NLRB v. Cable Car Advertisers, Inc.*, 319 F. Supp. 2d 991, 997 (N.D. Cal. 2004) (citing *Brooklyn Manor Corp. v. NLRB*, No. 99 MC 117, 1999 WL 1011935, at *4-5 (E.D.N.Y. Sept. 22, 1999)). With respect to the investigation in the present case, courts have specifically endorsed the Board’s use of administrative subpoenas to determine whether parties are in contempt of court judgments enforcing Board orders. *See NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991) (explaining that the Board is “obliged like other prosecutors to use its investigatory powers [under Section 11] before instituting a judicial proceeding”); *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1st Cir. 1983) (“[T]he Supreme Court has expressly sanctioned the use of statutory investigation powers to gather evidence of contempt . . .”).

Here, the Board issued an investigative subpoena to determine whether Respondent is in contempt of the Tenth Circuit's Judgment enforcing the Board's 2014 Order. This use of Section 11 subpoenas, as shown above, is proper and entirely within the Board's Section 11 subpoena power. Thus, the Board's use of this Section 11 subpoena to evaluate Respondent's compliance with the Tenth Circuit's Judgment falls within the meaning of "proceedings or investigation[s]" under Section 11 of the Act.

CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court enter an order requiring Respondent IUOE Local 627 to fully comply with Subpoena *Duces Tecum* B-1-RIXX41 and requiring that Respondent reimburse the Board for costs and attorneys' fees incurred in initiating and prosecuting this subpoena enforcement action.

Respectfully submitted,

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Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that the Board's attached Reply to Respondent's Response to the Board's Application for an Order Requiring Compliance with Investigative Subpoena was served via electronic notice by the CM/ECF filing system on this 4th day of November to the below listed party:

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